No. 91-761

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1991

THE PENN CENTRAL CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the confirmation of a railroad company's reorganization in 1978, under Section 77(f) of the former Bankruptcy Act, 11 U.S.C. 205(f) (1976), bars statutory claims against the reorganized company arising from the post-confirmation enactment of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 944 F.2d 164. The 1990 opinion of the district court (Pet. App. A17-A23) is reported at 1990-1991 CCH Bankr. L. Rep. ¶ 73,594. The 1988 opinion of the district court (Pet. App. A25-A39) is reported at 92 Bankr. 605.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1991. The petition for a writ of certiorari was filed on November 8, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Penn Central Corporation (PCC) is the entity that emerged in 1978 from the reorganization of the Penn Central Transportation Company (PCTC). The reorganization was accomplished through Section 77 of the Bankruptcy Act of 1898, 11 U.S.C. 205 (1976), and the Regional Rail Reorganization Act of 1973, 45 U.S.C. 701 *et seq.* The Bankruptcy Act of 1898 was repealed on October 1, 1979, but it continues to control this case through a statutory savings provision.[1]

The reorganization and its final plan are summarized in *In re Penn Central Transp. Co.*, 458 F. Supp. 1234, 1248-1261 (E.D. Pa. 1978). On October 24, 1978, the reorganization court issued its consummation order and final decree, which confirmed the reorganization plan and barred "future lawsuits against the reorganized debtor, PCC, 'on account of or based upon any right, claim or interest of any kind or nature whatsoever which any such person . . . may have in, to or against any of the Debtors, the Trustees of the Properties of the Debtors or any of their assets or properties.' " Pet. App. A6. The same order and decree provided that the reorganization court would retain jurisdiction to administer and enforce their terms. *Id.* at A30.

2. On December 11, 1980, two years after entry of the consummation order and final decree, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.* Section 106(a) of CERCLA authorizes the United States to secure

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[1] See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 403(a), 92 Stat. 2683; *Central Trust Co.* v. *Official Creditors' Committee*, 454 U.S. 354, 355-356, 359 (1982).

such relief as may be necessary to abate "an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." 42 U.S.C. 9606(a). Section 107(a) of CERCLA imposes retroactive liability on both present and past owners and operators of facilities for release of hazardous substances from those sites. 42 U.S.C. 9607(a). See Pet. App. A6.

Prior to its reorganization, PCTC and its corporate predecessor, the Pennsylvania Railroad Company, owned and operated the 23-acre Paoli Railroad Yard in Chester County, Pennsylvania, 15 miles west of Philadelphia. Pet. App. A25. During their ownership, PCTC and its predecessor used and serviced electrical transformers containing polychlorinated biphenyls (PCBs), which leaked or were dumped into the Yard. *Ibid.* On April 1, 1976, while the reorganization was in progress, respondent Consolidated Rail Corporation (Conrail) became the owner of the Paoli Yard, and Conrail immediately transferred ownership of the property to the National Rail Passenger Corporation (Amtrak). *Id.* at A27.[2]

Conrail operated the Paoli Yard from 1976 to 1982, and respondent Southeastern Pennsylvania Transportation Authority (SEPTA) has done so since January 1983. In 1986, the United States brought a civil action against SEPTA, Conrail, and Amtrak seeking specific relief and cost reimbursement for hazardous substance cleanup activities at

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[2] The 1976 transfer of the Paoli Yard and PCTC's other rail assets was done pursuant to the "final system plan," as proposed by the United States Railway Association, and as approved by Congress pursuant to Sections 207-208, 209(c)-(e) of the 1973 Regional Rail Reorganization Act, 45 U.S.C. 717-718, 719(c)-(e). See *In re Penn Central Transp. Co.*, 458 F. Supp. at 1252-1253.

the site pursuant to Sections 106 and 107 of CERCLA. *United States* v. *SEPTA et al.*, Civil No. 86-1094 (E.D. Pa.) See Pet. App. A29-A30. The United States also sought leave from the reorganization court to join petitioner in the action. *Id.* at A7, A30. Respondents Conrail and SEPTA filed similar requests to bring third-party claims against petitioner for contribution or indemnification in this and other suits. *Ibid.*[3]

The reorganization court issued an interim decision in 1988, Pet. App. A25-A41, and a final decision in 1990, *id.* at A17-A24, denying leave to join petitioner in the federal government's suit. It ruled that the claims of the United States, SEPTA, and Conrail were "precluded by the terms of the [1978] Consummation Order and firmly established principles of bankruptcy law" and that the subsequently enacted CERCLA statute "did not purport to change the law * * * or to mandate a different result." *Id.* at A18, A19.[4]

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[3] Private plaintiffs have filed at least six other suits against Conrail, SEPTA, and Amtrak, seeking damages and injunctive relief under federal or Pennsylvania law. Pet. App. A29-A30.

[4] In its 1988 decision, the reorganization court allowed certain claims for recovery of compensatory damages to proceed against petitioner. Such damage claims were limited to two categories:

> (1) "personal injuries (including wrongful death)" caused by "exposure to PCBs released or discharged before April 1, 1976," when PCTC still owned the Paoli Yard, "if such claim did not accrue before October 24, 1978 [the date of the consummation order and final decree]";
>
> (2) "property damage to adjacent properties occasioned by the pre-April 1, 1976 discharge of PCBs at the Paoli Yard * * * if the infiltration of PCBs to such adjacent

3. The court of appeals reversed the reorganization court's decision and directed that the United States and other respondents "be permitted to bring their CERCLA claims against [petitioner]." Pet. App. A16. The court observed that on October 24, 1978—the date of the reorganization court's consummation order and final decree—CERCLA had not yet been enacted. *Id.* at A10-A11. Accordingly, there was no basis at that time for the United States and the other respondents to seek imposition of CERCLA liability. *Id.* at A11. The court of appeals held that the 1978 consummation order accordingly did not discharge the then-nonexistent CERCLA claims against PCTC. *Ibid.*

The court of apeals also held that the Penn Central reorganization was not a "liquidation type" reorganization and that petitioner, as the reorganized company, "will bear the CERCLA costs" if the CERCLA claims prove meritorious. Pet. App. A12-A16. It explained that the reorganization plan established petitioner specifically to "continue the existence" of PCTC. *Id.* at A15 (emphasis omitted, quoting the Amended Plan of Reorganization). The court observed that petitioner retained PCTC's non-rail assets, that petitioner was able to obtain federal

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property was not, and in the exercise of due diligence could not reasonably have been, known prior to October 24, 1978."

Pet. App. A40. The court's 1990 decision announced that "all pending petitions for leave to prosecute claims or third-party claims against Penn Central Corporation (PCC) on account of environmental pollution alleged to arise from the property and activities of the Debtor, Penn Central Transportation Company (PCTC) prior to October 24, 1978, are DENIED," except "to the extent" that some of these petitions had "heretofore" been granted in part by the interim decision in 1988. Pet. App. A24.

tax benefits (in the form of "substantial income tax loss carry-forwards") through PCTC's representations to the Internal Revenue Service that it had no plan or intention to liquidate, and that petitioner's "post-bankruptcy history of acquisitions and long-term growth is completely inconsistent in any way with liquidation." *Id.* at A15-A16.[5]

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or of any other court of appeals. There accordingly is no warrant for review by this Court.

1. Petitioner argues that "[t]he Third Circuit's narrow definition of 'claim' undermines the protection and fresh start afforded by Congress to a reorganized company by creating an exception to the rule of finality." Pet. 11-14. The court of appeals simply recognized, however, that the United States did not have a claim under CERCLA until CERCLA

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[5] he court of appeals contrasted the continuity associated with the Penn Central reorganization to that of the Erie Lackawanna Railroad, which also went through a Section 77 reorganization. The court of appeals noted that the Sixth Circuit had held that, under "the unique facts surrounding the Erie Lackawanna bankruptcy proceedings," the reorganization more closely "resembled a liquidation" barring all claims against the reorganized company because, after liquidation, "no legal entity * * * remain[ed] in existence against which an action could be brought." Pet. App. A14. See *In re Erie Lackawanna Ry.*, 803 F.2d 881, 882 (6th Cir. 1986), cert. denied, 481 U.S. 1070 (1987). The Third Circuit found the Sixth Circuit's decision in *Erie Lackawanna* readily distinguishable based on its "anomalous fact pattern" and refused "to reach the issue of whether *Erie Lackawana* was decided correctly." Pet. App. A13.

was enacted and that the United States could not present its CERCLA claims in a reorganization proceeding that predated the statute. Pet. App. A10-A11. Thus, the reorganization court's consummation order, which discharged all claims against PCTC, Pet. App. A20, did not discharge petitioner's subsequently created CERCLA liability. *Id.* at A11.

That result is consistent with the terms of the relevant statutes. Section 77(f) of the former Bankruptcy Act provides in pertinent part that upon confirmation of the plan, "the debtor shall be discharged from its debts and liabilities." 11 U.S.C. 205(f) (1976). That provision, however, does not suggest that the reorganized debtor shall be released from future debts and liabilities that arise after confirmation of the plan. Petitioner, like any other company, is subject to new legal obligations, such as those that Congress imposed through CERCLA. The CERCLA liability provisions contain no exception for reorganized entities.

Petitioner suggests (Pet. 11-12) that the court of appeals' decision is inconsistent with this Court's statement in *Gardner* v. *New Jersey*, 329 U.S. 565 (1947), that "the sweeping, all-inclusive definitions of 'claims' and 'creditors' in § 77 leave no room for exception under it." *Id.* at 573. The Court made that observation, however, in the context of a holding that the reorganization court had jurisdiction over proof and allowance of state tax claims. See *id.* at 572-573. That case nowhere suggests that the term "claim" includes future obligations that arise after the reorganization. Indeed, the claims at issue in *Gardner* had clearly arisen prior to the filing of the reorganization petition. See *id.* at 568.[6]

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[6] Similarly, none of the other cases petitioner cites (Pet. 12-14) in support of a "broad" definition of the term "claim"

2. Petitioner errs in contending (Pet. 14-15) that the court of appeals' decision in this case conflicts "in principle" with the Second Circuit's decision in *In re Chateaugay Corp.*, 944 F.2d 997 (1991) (*LTV*). The issue in *LTV* was whether the United States was obligated to submit a claim for unincurred CERCLA response costs in an ongoing Chapter 11 reorganization that was commenced in 1986, six years *after* Congress enacted CERCLA. The court concluded that unincurred costs attributable to pre-petition releases or threatened releases of hazardous substances were contingent claims under the Bankruptcy Code. *Id.* at 1005. It reasoned that the government could make a "speedy and rough estimation" of its future costs for purposes of the reorganization proceeding with "ultimate liquidation of the claims to await the outcome of normal CERCLA enforcement proceedings." *Id.* at 1006.

The *LTV* decision is clearly distinguishable from the instant case. In *LTV*, the reorganization commenced *after* the enactment of CERCLA, and the issue was whether the government was required to submit claims for future response costs, even where it had not yet identified the waste sites or begun cleanup activities. Additionally, there was a CERCLA response and enforcement program in place before LTV's Chapter 11 petition was filed. The Second Circuit specifically emphasized that it was the availability of CERCLA remedies prior to

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suggests that the term includes new obligations that arise under post-confirmation law. See, *e.g.*, *Johnson* v. *Home State Bank*, 111 S. Ct. 2150 (1991); *Pennsylvania Dep't of Public Welfare* v. *Davenport*, 110 S. Ct. 2126 (1990); *Ohio* v. *Kovacs*, 469 U.S. 274 (1985).

reorganization that allowed the unincurred costs to be treated as contingent claims:

> The relationship between environmental regulating agencies and those subject to regulation provides sufficient "contemplation" of contingencies to bring most ultimately maturing payment obligations based on pre-petition conduct within the definition of "claims."

944 F.2d at 1005. Here, by contrast, the reorganization was consummated *before* the enactment of CERCLA, and the issue is whether the consummation order bars the United States from pursuing claims based on a post-reorganization statute. Furthermore, there was no CERCLA regulatory program in place at the time of PCTC's 1970 reorganization petition.[7]

Petitioner also argues that there is some inconsistency (Pet. 14-15) between the reasoning of *LTV* and that of the decision below, arising from the court of appeals' reliance on its earlier precedent in *Schweitzer* v. *Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), cert. denied, 474 U.S. 864 (1985). The court held in *Schweitzer* that a railroad, reorganized under former Section 77, is not discharged from post-confirmation personal injury claims brought by former railroad employees, who in the course of their work had been exposed to asbestos. It concluded that those claims were not discharged by the final consum-

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[7] The same considerations distinguish *In re Jensen*, 127 Bankr. 27 (Bankr. 9th Cir. 1991), appeal pending (9th Cir. No. 91-15879). The Ninth Circuit Bankruptcy Appeals Panel held that a state agency's CERCLA claim for cleanup costs arose from the debtor's pre-petition conduct and, therefore, was discharged in a Chapter 7 bankruptcy. 127 Bankr. at 32-33. However, the debtor's petition was filed in 1984, long after CERCLA had been in effect. *Id.* at 28, 33.

mation order, because at that time they did not exist; the injuries were then subclinical and did not become manifest until after the consummation order. See 758 F.2d at 939, 942; see also discussion at Pet. App. A9-A10. Petitioner suggests (Pet. 14-15) that the Second Circuit's affirmance in *LTV* reflects a rejection of the reasoning of *Schweitzer* and similar cases.

The Second Circuit's disagreement with a case *cited* by the Third Circuit would provide no basis for this Court to review the Third Circuit's decision. In any event, there is no disagreement here. Petitioner concedes that the Second Circuit was "not specifically critical of *Schweitzer*." Pet. 15-16. *LTV* discussed *Schweitzer* and like cases, but expressed no opinion on whether they were correctly decided. See 944 F.2d at 1003-1004 ("We need not decide how the definition of 'claim' applies to tort victims injured by pre-petition conduct, especially as applied to the difficult case of pre-petition conduct that has not yet resulted in detectable injury.").

3. Petitioner next asserts (Pet. 15-18) that the decision below necessitates a general evaluation of the Third Circuit's supposedly narrow definition of bankruptcy claims. Petitioner traces the origin of that definition to *In re M. Frenville Co.*, 744 F.2d 332, 333-334 (3d Cir. 1984), cert. denied, 469 U.S. 1160 (1985), and asks this Court to examine the decision in that case. Pet. 4 n.1, 9, 15. Significantly, *Frenville* was not cited in the decision below, and its relevance here is tenuous at best. Petitioner attempts (Pet. 15) to link *Frenville* to the instant case by the fact that the court of appeals cited *Schweitzer*, see Pet. App. A9-A11, and *Schweitzer* in turn cited *Frenville*, see 758 F.2d at 943.

The *Frenville* decision—which held that the Bankruptcy Code's automatic stay provision, 11 U.S.C.

362(a), does not stay a creditor's post-petition suit against the debtor where the debtor's pre-petition acts did not mature into a cause of action until after his petition was filed—plainly does not address the issue presented here. Neither *Frenville* nor the decisions in other circuits criticizing it (Pet. 16-18 & nn.5-6) involved an assertion by a reorganized debtor that a pre-CERCLA reorganization barred the government's CERCLA suit.[8] Whatever differences exist among the circuits as to the effect of delayed manifestations of a debtor's conduct on a bankruptcy claim, those differences will not be settled by granting review in this case.

4. Finally, petitioner argues (Pet. 18-21) that the court of appeals' decision "raises important questions of federal law which should be settled without delay." The issue actually presented here, however, is a narrow one. The court simply held that a reorganized debtor may not rely on a pre-CERCLA consummation order to prevent adjudication of its CERCLA liability. The court of appeals' decision in this case is the first and only appellate decision resolving that issue.

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[8] Of all the cases the petitioner relies upon, only three involve CERCLA at all, namely, *In re Jensen*, 127 Bankr. 27; *LTV*, 944 F.2d 997, and *United States* v. *Union Scrap Iron & Metal*, 123 Bankr. 831, 835-838 (D. Minn. 1990). The bankruptcy petitions in all three were filed after CERCLA's enactment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45302